No. 89-1508

Supreme Court, U.S.
FILED
OCT 25 1990
JOSEPH F. SPANIOL, JR
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

GERALD M. STERN
PAUL E. GOLDSTEIN
PAUL KORMAN
10889 Wilshire Blvd.
Los Angeles, CA 90024

HARVEY I. SAFERSTEIN
JAMES N. ADLER
STEVEN A. MARENBERG
IRELL & MANELLA
1800 Avenue of the Stars
Los Angeles, CA 90067

J. CURTIS MOFFATT
VAN NESS, FELDMAN & CURTIS
1050 Thomas Jefferson St., N.W.
Washington, DC 20007

JOHN T. CUSACK
GARDNER, CARTON & DOUGLAS
321 N. Clark Street
Chicago, IL 60610

JOEL I. KLEIN *
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, DC 20037
(202) 775-0184

PHILLIP AREEDA
1545 Massachusetts Ave.
Cambridge, MA 02138

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	4

TABLE OF AUTHORITIES

Case:

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1508

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

ARGUMENT

Urging that the petition in this case be denied, the Solicitor General, on behalf of the United States and FERC, advised the Court that the Tenth Circuit "correctly resolved" both the preemption and antitrust issues "based on the particular record in this case" and that "the decision below does not present any square conflict with another court of appeals decision [and] arises in an unusual factual context not likely to be replicated." SG Br. 11. The Solicitor General further explained that, despite CIG's efforts to recast the decision, the Tenth Circuit's ruling presents "relatively narrow" issues and that this case would be an "unsuitable vehicle" for consideration of the broad questions framed by CIG. *Ibid.* CIG's attempt to escape those conclusions in its Reply

once again ignores the issues that are actually presented by the ruling below.[1]

1. CIG leads with the assertion that the Solicitor General "seriously mischaracterize[d] the court of appeals' opinion[,] . . . [which] did *not* treat the case as one of actual monopoly; rather, it held that petitioner could not prevail on its attempted monopolization claim." Reply to SG Br. 2. CIG is engaged in semantic quibbling, because, as the Solicitor General explained in analyzing CIG's attempted monopoly claim, "The question of probability of success had resolved itself into the question whether success had been achieved." SG Br. 16. CIG's antitrust claim is that Natural allegedly increased the Trailblazer System's market share by exercising its contractual reservation of capacity on CIG's system. That tool, however, had been fully exhausted at the time of trial: Natural had "exercise[d] *all* its rights under the [CIG-Natural] Service Agreement to tie up the *entire* capacity it had reserved." Pet. App. 23a. Consequently, "[t]he necessarily limited scope of Natural's objective leaves no room for speculation about the probability that the Trailblazer System would gain a monopoly." *Ibid.*

As the Solicitor General observed, therefore, CIG could not prevail on its claim of attempted monopolization in this unusual case without demonstrating that the Trailblazer System had already achieved monopoly power. On that question, the Tenth Circuit ruled that CIG had not proved such power. *See* SG Br. 16-18. Indeed, as we have previously explained (*see* Br. in Opp. 22-23), the court could not have drawn any other conclusion. *See also* page 3, *infra*. In any event, the court's ruling that

---

[1] We make only a few points in this supplemental brief and otherwise rely on our previous submission and the Solicitor General's brief, which fully answer all of CIG's arguments. In response to CIG's reliance on *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), we note that, in the present case, there is no division of views within the government.

such proof was lacking here plainly does not merit review.

2. CIG's linguistic diversion aside, it remains clear that CIG's antitrust question raises an issue that is not presented by the decision below. Contrary to CIG's claim, the Tenth Circuit did not deny liability while "accept-[ing] without question facts that are themselves sufficient to prove actual monopolization." Reply to SG Br. 3. In particular, the court did not find the "facts" that CIG says were found—namely, that CIG proved that the Trailblazer System had the ability to exclude CIG and to charge supracompetitive prices. *Ibid.* The Solicitor General correctly explained that the court of appeals' opinion contains no such findings (SG Br. 16-17), and it is clear that the opinion *could* not have done so. Neither the court of appeals nor the district court, of course, was the fact-finder; and the jury, which was the sole fact-finder, was not instructed to find, and did not find, any ability to control prices or to exclude competition. Nor, as we have previously explained, did the evidence support, let alone compel, any such finding. Br. in Opp. 22-23; *see also* SG Br. 16-17. Thus, the entire premise of CIG's antitrust challenge in this Court is mistaken: the Tenth Circuit did not have before it, and did not itself manufacture, findings that CIG had proved the elements of monopoly power, and therefore could not have ignored such findings in rejecting CIG's antitrust claim.

3. CIG's challenge to the Solicitor General's views on the preemptive scope of FERC's orders ignores CIG's own petition for certiorari. In that filing, CIG castigated the Tenth Circuit for "refus[ing] to solicit FERC's views on this issue[,]" explaining that "FERC's intent 'can be answered fully and quickly through amicus participation.'" Pet. 16 & n.14 (quoting *Distrigas of Massachusetts Corp. v. Boston Gas Co.*, 693 F.2d 1113, 1118-19 (1st Cir. 1982)). Through the government's *amicus curiae* brief in this Court, FERC has unambiguously

answered the question that CIG itself acknowledges to be dispositive. That CIG does not like FERC's answer provides no basis for further review. In any event, FERC's interpretation of its own orders in this case is correct. *See* SG Br. 11-15.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GERALD M. STERN
PAUL E. GOLDSTEIN
PAUL KORMAN
10889 Wilshire Blvd.
Los Angeles, CA 90024

HARVEY I. SAFERSTEIN
JAMES N. ADLER
STEVEN A. MARENBERG
IRELL & MANELLA
1800 Avenue of the Stars
Los Angeles, CA 90067

J. CURTIS MOFFATT
VAN NESS, FELDMAN & CURTIS
1050 Thomas Jefferson St., N.W.
Washington, DC 20007

JOHN T. CUSACK
GARDNER, CARTON & DOUGLAS
321 N. Clark Street
Chicago, IL 60610

JOEL I. KLEIN *
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, DC 20037
(202) 775-0184

PHILLIP AREEDA
1545 Massachusetts Ave.
Cambridge, MA 02138

* Counsel of Record